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No.

# In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

*v.*

NOPRING PAULINO PENULIAR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting.

## PARTIES TO THE PROCEEDINGS

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondent is Nopring Paulino Penuliar.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 435 F.3d 961. The initial opinion of the court of appeals (App., *infra*, 19a-33a) is reported at 395 F.3d 1037. The decisions of the Board of Immigration Appeals (App., *infra*, 34a) and the immigration judge (App., *infra*, 35a-41a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005, and amended on January 23, 2006. A petition for rehearing was denied on January 23, 2006. On April 12, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 23, 2006. On May 15, 2006, Justice Kennedy further extended the time to June 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense * * *.

Cal. Veh. Code § 10851(a) (West 2000).

## STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. III 2003), several classes of aliens are subject to removal

from the United States, including those who have been convicted of certain kinds of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category of offenses. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" (and thus an aggravated felony) under the INA, courts apply the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. III 2003).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach

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[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. III 2003). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

and review certain documents in the record of the criminal case (such as the charging instrument and judgment) to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

2. Respondent is a native and citizen of the Philippines. He was admitted to the United States in 1995 as a lawful permanent resident. App., *infra*, 3a, 38a.

In June 2000, respondent was charged in a California court with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). The felony complaint alleged that respondent unlawfully drove and took a 1994 Ford Escort without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to two years of imprisonment. App., *infra*, 3a-4a, 38a-39a, 42a-44a.

In November 2000, respondent was again charged in a California court with unlawful driving or taking of a vehicle. He was also charged with evading an officer, in violation of California Vehicle Code § 2800.2(a) (West 2000). With respect to the former charge, the information alleged that respondent unlawfully drove and took a 1995 Ford van without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the two charges and was sentenced to three years of imprisonment. App., *infra*, 4a, 39a, 48a-52a, 54a-55a.

3. In 2002, the Immigration and Naturalization Service (INS) initiated removal proceedings against respondent.[2] He was charged with removability under Section

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[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. III 2003).

237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of aggravated felonies. The INS alleged that the unlawful-driving-or-taking-of-a-vehicle offenses were aggravated felonies because they were "theft offenses" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(G), and that the offense of evading an officer was an aggravated felony because it was both a "crime of violence," 8 U.S.C. 1101(a)(43)(F), and an "offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), for which the term of imprisonment was at least one year. App., *infra*, 4a-5a & n.2, 35a-40a.

The immigration judge (IJ) ruled that unlawful driving or taking of a vehicle is a theft offense and that evading an officer is a crime of violence but not a crime relating to obstruction of justice. The IJ accordingly found that respondent was removable from the United States. After ruling that respondent's aggravated-felony convictions rendered him ineligible for cancellation of removal, the IJ ordered him removed to the Phillipines. App., *infra*, 35a-41a.

The Board of Immigration Appeals (BIA) affirmed the IJ's decision without opinion. App., *infra*, 34a.

4. The Ninth Circuit held that none of the crimes of which respondent was convicted was an aggravated felony and granted his petition for review. App., *infra*, 19a-33a.

a. With respect to respondent's conviction for evading an officer, the Ninth Circuit held that the offense was not a crime of violence as a "categorical" matter, because the statute can be violated if the defendant causes property damage or commits at least three motor-vehicle violations of a certain type, and such conduct does not require intent or even recklessness, an

essential element of a "crime of violence." App., *infra*, 23a-26a. The court also held that respondent had not been convicted of a crime of violence under the "modified categorical" approach, because the charging document merely tracked the statutory language and the judgment merely reflected that respondent had pleaded guilty to the charge. *Id.* at 27a-29a.

b. With respect to respondent's convictions for unlawful driving or taking of a vehicle, the Ninth Circuit held that a violation of California Vehicle Code § 10851(a) is not a theft offense as a "categorical" matter. App., *infra*, 29a-31a. The court reasoned that the California statute can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over property, which the court considered an essential element of the generic definition of "theft offense." *Ibid.* The Ninth Circuit also held that the Section 10851(a) convictions were not for a theft offense under the "modified categorical" approach. *Id.* at 31a-33a. Although the charges to which respondent pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a theft offense, because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

5. The government filed a petition for panel rehearing and rehearing en banc, which raised two claims. The first was that the California offense of unlawful driving or taking of a vehicle is an aggravated felony, because aiding and abetting falls within the generic definition of "theft offense." Reh'g Pet. 4-12. The second was that

respondent failed to exhaust administrative remedies, because he did not present to the BIA the claim that the offenses of conviction were not aggravated felonies. *Id.* at 12-13.

The Ninth Circuit denied the petition for rehearing, and issued an amended opinion. App., *infra*, 1a-18a. In the amended opinion, the court stated that the contention that aiding and abetting is part of the generic definition of "theft offense" was foreclosed by a decision issued after the Ninth Circuit's initial decision in this case, *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005), which held that grand theft, in violation of California Penal Code § 487(c) (West 1999), was not a theft offense under the INA because a defendant can be convicted under an aiding-and-abetting theory. App., *infra*, 15a n.6. The amended opinion did not address the government's exhaustion claim.

**REASONS FOR GRANTING THE PETITION**

1. Since filing its amended opinion, the Ninth Circuit has granted petitions for review in a number of cases on the basis of its decision in this case. One such case is *Duenas-Alvarez* v. *Gonzales*, No. 04-74471, 2006 WL 1009222 (Apr. 18, 2006) (per curiam). As in this case, the offense at issue in *Duenas-Alvarez* was unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). 2006 WL 1009222, at *1. As in this case, the Ninth Circuit held in *Duenas-Alvarez* that that offense is not a "theft offense," because it criminalizes aiding and abetting, which, in the Ninth Circuit's view, is not included in the generic definition of theft offense. *Ibid.*

Simultaneously with the filing of the certiorari petition in this case, the government is filing a certiorari

petition in *Duenas-Alvarez*. As explained below, that case is a more suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. The Court should therefore grant plenary review in *Duenas-Alvarez* and hold the petition in this case pending the disposition of *Duenas-Alvarez*.

2. Under 8 U.S.C. 1252(d)(1), "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The Ninth Circuit treats this requirement as jurisdictional, see *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (2004), as do a number of other courts of appeals, see *Popal* v. *Gonzales*, 416 F.3d 249, 252 (3d Cir. 2005); *Un* v. *Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004); *Foster* v. *INS*, 376 F.3d 75, 77 (2d Cir. 2004) (per curiam); *Wang* v. *Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001); *Fernandez-Bernal* v. *Attorney General of the United States*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam). While the Ninth Circuit denied the government's petition for rehearing in this case without addressing its exhaustion claim, there is a substantial question whether respondent complied with Section 1252(d)(1), and thus whether the court of appeals had jurisdiction.

In his notice of appeal to the BIA, one of the "reason(s) for this appeal" identified by respondent was that "[i]t is not clear that the crimes set out in the Notice to Appear [for removal proceedings] are aggravated felonies." App., *infra*, 63a. And in his brief before the BIA, one of the two issues in the "Statement of Issues" was "[w]hether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and

[was] therefore[] ineligible for relief under § 240A(a) of the Immigration and Nationality Act," which governs cancellation of removal, 8 U.S.C. 1229b(a). App., *infra*, 57a. In the "Argument" section of the brief, however, respondent did not contend that either of the offenses on which his removal was based was not an aggravated felony. Instead, he raised only a constitutional argument concerning the availability of discretionary relief from removal. *Id.* at 59a-60a. And nowhere in either his notice of appeal or his brief did respondent say anything that remotely resembles the aiding-and-abetting theory ultimately adopted by the court of appeals.

In *Duenas-Alvarez*, by contrast, no exhaustion question is present. Before both the IJ and the BIA, Duenas-Alvarez unequivocally took the position that he had not been convicted of a "theft offense" (and thus an aggravated felony), A.R. at 10-16, 186-187, 190-193, *Duenas-Alvarez*, *supra*, and he specifically argued that his crime of conviction was not a theft offense because a defendant can be convicted of violating California Vehicle Code § 10851(a) under an aiding-and-abetting theory, A.R. at 14-15, 191-192, *Duenas-Alvarez*, *supra*. The presence of a threshold issue in this case, but not in *Duenas-Alvarez*, makes *Duenas-Alvarez* a more suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. Accordingly, the Court should grant plenary review in *Duenas-Alvarez* and hold the petition in this case.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Duenas-Alvarez* and then disposed of accordingly.

Respectfully submitted.

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JUNE 2006

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 03-71578

NOPRING PAULINO PENULIAR, PETITIONER

*v.*

ALBERTO R. GONZALES,* ATTORNEY GENERAL,
RESPONDENT

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Argued and Submitted: Dec. 10, 2004
Filed: Jan. 12, 2005
Amended: Jan. 23, 2006

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**ORDER AMENDING OPINION AND DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION**

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Before: BROWNING, PREGERSON, and BERZON, Circuit Judges.

PREGERSON, Circuit Judge.

**ORDER**

The Opinion filed January 12, 2005, slip op. 453, and appearing at 395 F.3d 1037, is amended as follows:

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* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

1. At slip op. 453, add asterisk footnote in caption following "ALBERTO R. GONZALES." Asterisk footnote shall read, "Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2)."

2. Change the citation at slip op. 465 following the sentence that ends, ". . . a theft offense under the INA." to read, "*See Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005)."

3. Change the citation at slip op. 465 following the sentence that ends, ". . . falls outside the generic definition of theft offense." to read, "*Id.*"

4. Add footnote 6 at slip op. 466 and adjust other footnotes accordingly following the sentence that ends, ". . . qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." The added footnote 6 reads:

> In its petition for rehearing, the government argues that aiding and abetting liability is included in the generic definition of a "theft offense." *See* 8 U.S.C. § 1101(a)(43)(G). That assertion, however, is foreclosed by our decision in *Martinez-Perez*, 417 F.3d at 1028 (holding that a conviction for grand theft under California Penal Code § 487(c) was not a "theft offense" within the meaning of the INA because a defendant could "be convicted of a substantive violation . . . based on an aiding and abetting theory alone"), by which we are bound. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir. 2003) ("A three-judge panel generally has no power to overrule a decision of this court.").

5. Change the citation at slip op. 466 that precedes "B. Modified Categorical Approach" to read, "*See Martinez-Perez*, 417 F.3d at 1027-28."

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**. No further petitions shall be entertained.

**OPINION**

Nopring Paulino Penuliar petitions for review of a decision of the Board of Immigration Appeals ("BIA"). Penuliar, a lawful permanent resident, pled guilty to two counts of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). Classifying both convictions as "aggravated felonies" under the Immigration and Nationality Act ("INA"), an Immigration Judge ("IJ"), affirmed by the BIA, found Penuliar ineligible for cancellation of removal and voluntary departure, and ordered that Penuliar be deported pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Because we conclude that Penuliar's convictions do not constitute "aggravated felonies" under the INA, we grant his petition for review.

FACTUAL AND PROCEDURAL BACKGROUND

Nopring Paulino Penuliar, a citizen of the Philippines, was admitted to the United States on June 12, 1995, as a lawful permanent resident. On June 30, 2000,

Penuliar pled guilty to one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and was sentenced to two years' imprisonment. On December 13, 2000, Penuliar pled guilty to another count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). He was sentenced to three years' imprisonment for each charge, to be served concurrently.

While serving his sentence in state prison, the Immigration and Naturalization Service ("INS")[1] served Penuliar with a notice to appear.[2] In the notice to appear, the INS alleged that Penuliar was removable for being convicted of "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). The INS also alleged that Penuliar was removable for being convicted of "a theft offense (including receipt of stolen property) or burglary of-

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[1] The INS ceased to exist on March 1, 2003, when its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. However, we refer to the agency as the INS here because the proceedings in this case were instigated before the transfer.

[2] The initial notice to appear charged that Penuliar was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), because he had been convicted of "an offense relating to obstruction of justice," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(S). The IJ ruled that Penuliar's convictions did not constitute offenses "relating to obstruction of justice," and the government did not appeal that decision to the BIA. Accordingly, that decision is not before us.

The remaining charges, which are before us, were included in an amended notice to appear.

fense for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(G).

At Penuliar's removal hearing, the government introduced into evidence a felony complaint charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to that count. The government also introduced a criminal information charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to both counts. Finally, the government introduced a probation report detailing the conduct underlying the charges in the criminal information.

Based on this evidence, the IJ concluded that Penuliar's two convictions for unlawful driving or taking of a vehicle were "theft offense[s]" under 8 U.S.C. § 1101(a)(43)(G), and that Penuliar's conviction for evading an officer was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). Accordingly, the IJ ruled that Penuliar was removable as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and therefore ineligible for cancellation of removal and voluntary departure. *See* 8 U.S.C. §§ 1229b(a)(3), 1229c(a)(1).

On March 31, 2003, the BIA summarily affirmed the decision of the IJ. *See* 8 C.F.R. § 1003.1(e)(4). Penuliar timely filed this petition for review.

JURISDICTION AND STANDARD OF REVIEW

This court lacks jurisdiction to review a final order of removal against an alien who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C). Nonetheless, "[b]ecause the issue in this appeal is whether [the petitioner] committed an aggravated felony, and because we have jurisdiction to determine our own jurisdiction, the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000) (citation omitted).

We review *de novo* whether a particular offense is an aggravated felony. *Id.*

DISCUSSION

To determine whether a conviction is an "aggravated felony" under the INA, we employ the two step test set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). *See Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). First, "we look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)." *Id.* "Under this 'categorical approach,' an offense qualifies as an aggravated felony 'if and only if the full range of conduct covered by the [criminal statute] falls within the meaning of that term.'" *Id.* (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)).

However, when the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, we follow a "modified categorical approach." *See id.; United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). Under this approach, we conduct "a limited examina-

tion of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime." *Chang*, 307 F.3d at 1189. "[W]e do not, however, look to the particular facts underlying the conviction." *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154 (9th Cir. 2003) (quoting *Ye*, 214 F.3d at 1132).

## I. Evading an Officer

### A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(F), the term "aggravated felony" means "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." Title 18 U.S.C. § 16, in turn, defines the term "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

We have construed 18 U.S.C. § 16 as requiring more than mere negligent conduct. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) ("[W]e hold that the presence of the volitional 'use . . . against' requirement in both prongs of 18 U.S.C. § 16 means that a defendant cannot 815 commit a 'crime of violence' if he negligently—rather than intentionally or recklessly—hits someone or something . . . ."). Thus, in *Trinidad-Aquino* we held that because California's

driving under the influence statute, California Vehicle Code § 23153, can be violated through mere negligence, a violation of the statute was not a "crime of violence" under 18 U.S.C. § 16. *Id.* at 1146.

The Supreme Court recently affirmed this reading of 18 U.S.C. § 16, holding that a conviction under Florida's drunk driving statute was not a "crime a violence." *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 383-84, 160 L.Ed.2d 271 (2004). The Court reasoned that "[t]he key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 382. Similarly, the Court held that we "must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 383. The Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

California Vehicle Code § 2800.2(a) makes it a crime "[i]f a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property." The statute further provides that "willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Cal. Veh. Code § 2800.2(b).

As defined by subsection (b), "willful or wanton disregard" exists if a driver commits three Vehicle Code violations. As one court explained,

> [a]lthough Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof *that the defendant committed three Vehicle Code violations.*

*People v. Pinkston*, 112 Cal. App. 4th 387, 392, 5 Cal. Rptr. 3d 274 (2003) (emphasis added). Many California Vehicle Code violations, however, do not require reckless or intentional disregard for the safety of persons or property within the meaning of 18 U.S.C. § 16.[3] In other words, "willful or wanton disregard," as defined by California Vehicle Code § 2800.2(b), is broader than the traditional *mens rea* of recklessness. *Cf. Trinidad-Aquino*, 259 F.3d at 1146 ("Thus, recklessness requires conscious disregard of a risk of harm that the defendant is aware of—a volitional requirement absent in negligence."). Because it would be possible to engage in "willful or wanton disregard for the safety of persons or property" by negligently committing three Vehicle

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[3] For instance, a traffic violation point can be assessed where a driver owns and operates a car that is "(1) [n]ot registered or for which any fee has not been paid under [the vehicle] code," "(2) [n]ot equipped as required in [the vehicle] code," or "(3) [n]ot in compliance with the size, weight, or load provisions of [the vehicle] code." Cal. Veh. Code §§ 12810(f), 40001(b)(1)-(3). In addition, a traffic point may be assessed for, "[e]xcept as provided in subdivision (i) [exempting certain conduct where the driver is not the owner of the vehicle], any other traffic conviction involving the safe operation of a motor vehicle upon the highway." *Id.* § 12810(f).

Code violations, Section 2800.2 is broader than a "crime of violence" as defined by 18 U.S.C. § 16.

The government relies on *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), in which we held that the offense of evading an officer under the 1992 version of California Vehicle Code § 2800.2 was a "crime of violence" under 18 U.S.C. § 16. In reaching this conclusion, we relied on California case law construing "willful or wanton misconduct" as "intentional wrongful conduct." *Id.* at 961. But the meaning of "willful or wanton disregard" in section 2800.2 has since been amended to include the commission of three California Vehicle Code violations. *See Pinkston*, 112 Cal. App. 4th at 391, 5 Cal. Rptr. 3d 274 ("Vehicle Code section 2800.2, subdivision (b) . . . was added to section 2800.2 in 1996."). Because *Campos-Fuerte* relied on the previous meaning of "willful or wanton" in reaching its result, it is not binding in the present case.

Accordingly, we conclude that a conviction for evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a "crime of violence" within the meaning of 18 U.S.C. § 16.

B. Modified Categorical Approach

In concluding that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16, and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), the IJ relied on three pieces of evidence. The IJ relied on (1) the November 21, 2000, criminal information charging Penuliar with evading an officer in violation of California Vehicle Code § 2800.2(a), (2) an abstract of judgment showing that Penuliar pled guilty to that charge, and (3) a probation

officer's report.[4] The government did not introduce either Penuliar's plea agreement or a transcript of Penuliar's plea proceeding into the record. Instead, the government argues that the information and abstract of judgment were sufficient for the IJ to determine that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16. We disagree.

The judicially noticeable documents in the record are insufficient to establish whether Penuliar pled guilty to reckless or negligent conduct. The information charging Penuliar with evading an officer contains nothing more than the generic statutory language from California Vehicle Code § 2800.2(a).[5] But as discussed above, the statute is broader than the generic "crime of

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[4] On appeal, however, the government abandons any reliance on the probation officer's report to establish that Penuliar was convicted of a "crime of violence" under the modified approach.

[5] Count three in the November 21, 2000, Information states:

> On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did wilfully and unlawfully, while operating a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all of the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and reasonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.
>
> It is further alleged that the defendant(s) drove with a willful and wa ton disregard for the safety of persons and property.

violence" under 18 U.S.C. § 16 because it criminalizes negligent conduct. Thus, the abstract of judgment, which simply recites that Penuliar pled guilty to the charge, is plainly insufficient to establish that Penuliar pled guilty to reckless conduct constituting a "crime of violence." *See United States v. Contreras-Salas*, 387 F.3d 1095, 1098 (9th Cir. 2004) (holding that defendant was not convicted of a crime of violence where information and judgment of conviction failed to establish whether defendant was convicted of "volitional, reckless, or negligent conduct").

Finally, insofar as the IJ relied on the probation report to establish that Penuliar pled guilty to a "crime of violence," he was in error. *See Corona-Sanchez*, 291 F.3d at 1212 ("[W]e have held that a presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition.").

Accordingly, we conclude that the BIA erred in affirming the IJ's decision that Penuliar's conviction under California Vehicle Code § 2800.2(a) was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F).

## II. Unlawful Driving or Taking of a Vehicle

### A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(G), the term "aggravated felony" means "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." This circuit defines a "theft offense" under § 1101(a)(43)(G) to mean "a taking of property or an exercise of control over property without consent with the criminal intent

to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (quoting *Corona-Sanchez*, 291 F.3d at 1205).

In *Corona-Sanchez*, we held that a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical "theft offense" under 8 U.S.C. § 1101(a)(43)(G). 291 F.3d at 1208. In reaching this conclusion, we relied in part on the broad nature of aiding and abetting liability under California law, noting that such liability "extend[s] even to promotion and instigation." *Id.*; *see also People v. Beeman*, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, *or of encouraging or facilitating* commission of, the offense." (emphasis added)). We reasoned that because a defendant can be convicted of the substantive offense for aiding and abetting a theft, "it would not be apparent from reference to the statute of conviction alone to discern whether or not the criminal act was embraced within the federal sentencing definition." *Corona-Sanchez*, 291 F.3d at 1208.

We recently applied this same reasoning, holding that a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense under the INA. *See Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005). Relying on our decision in *Corona-Sanchez*, we concluded that "[b]ecause a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting

theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.*

A conviction under California's vehicle theft statute is broader than the generic definition of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) for the same reason. Under California Vehicle Code § 10851(a), a person is guilty of unlawful driving or taking of a vehicle if he or she

> drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or . . . is a party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing. . . .

Cal. Veh. Code § 10851(a) (emphasis added). As the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability. *See, e.g., People v. Clark*, 251 Cal. App. 2d 868, 874, 60 Cal. Rptr. 58 (1967) ("At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving."). Because the statute criminalizes activity that is neither "a taking of property or an exercise of control over property," we conclude that a conviction under California Vehicle Code § 10851(a) does not categorically qualify as a "theft offense" within the

meaning of 8 U.S.C. § 1101(a)(43)(G).[6] See *Martinez-Perez*, 417 F.3d at 1027-28.

B. Modified Categorical Approach

In concluding that Penuliar committed a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), the IJ relied on two separate convictions under California Vehicle Code § 10851(a). The IJ relied on a felony complaint, dated June 1, 2000, charging Penuliar with unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on June 30, 2000. The IJ also relied on a criminal information, dated November 21, 2000, charging Penuliar with another count of unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on December 13, 2000.[7] As was the case with Penuliar's conviction for

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[6] In its petition for rehearing, the government argues that aiding and abetting liability is included in the generic definition of a "theft offense." *See* 8 U.S.C. § 1101(a)(43)(G). That assertion, however, is foreclosed by our decision in *Martinez-Perez*, 417 F.3d at 1028 (holding that a conviction for grand theft under California Penal Code § 487(c) was not a "theft offense" within the meaning of the INA because a defendant could "be convicted of a substantive violation . . . based on an aiding and abetting theory alone"), by which we are bound. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir. 2003) ("A three-judge panel generally has no power to overrule a decision of this court.").

[7] The IJ also relied on a probation officer's report that details the facts underlying Penuliar's December 13, 2000, conviction for unlawful driving or taking of a vehicle. However, as previously discussed, the IJ's reliance was misplaced insofar as he used the probation officer's report to establish that Penuliar pled guilty to conduct described therein. *See Corona- Sanchez*, 291 F.3d at 1212.

evading an officer, the government did not submit Penuliar's actual plea agreement or a transcript of the plea proceeding.

The government argues that because both counts of unlawful driving and taking of a vehicle describe Penuliar as a principal, and because Penuliar pled guilty to both counts, the charging documents and the abstract of judgment are sufficient to establish that Penuliar was convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Indeed, both charging documents recited the statutory language for unlawful driving or taking of a vehicle under California law, charging Penuliar with "unlawfully driv[ing] and tak[ing] a certain vehicle . . . then and there the personal property of [another] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."[8]

However, as we recognized in *Corona-Sanchez*, under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as

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[8] Count One in the June 1, 2000, felony complaint states:

> On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Count Three of the November 21, 2000 criminal information is identical in its language, except that it lists a different car, license number, and owner.

an accusatory pleading against a principal. 291 F.3d at 1207-08; *see* Cal. Penal Code §§ 971, 31; *see also People v. Greenberg*, 111 Cal. App. 3d 181, 188, 168 Cal. Rptr. 416 (1980) ("In California one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and abetting theory so long as defendant is charged in that pleading as a principal to the substantive offense and thus receives notice of the charge against him."). Thus, even if Penuliar pled guilty to the charges of unlawful driving or taking of a vehicle in the information and felony complaint, this alone is insufficient to unequivocally demonstrate that he actually pled guilty to activity of a principal, e.g., taking and exercising control over a stolen car.

Again, we must conclude that the IJ erred in finding that Penuliar had been convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). The charging documents, coupled with the abstracts of judgment, simply do not prove that Penuliar actually took and exercised control over a stolen car. On the basis of the record, it is equally plausible that Penuliar pled guilty to the charges based on his activity as an accomplice.

## CONCLUSION

In sum, we hold that evading an officer in violation of California Vehicle Code § 2800.2(a), is not categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). We also hold that unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Finally, we conclude that the BIA

erred in affirming the IJ's decision that Penuliar pled guilty to a "crime of violence" or a "theft offense" under the INA.

PETITION GRANTED.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 03-71578

NOPRING PAULINO PENULIAR, PETITIONER

*v.*

JOHN ASHCROFT, ATTORNEY GENERAL, RESPONDENT

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Argued and Submitted: Dec. 10, 2004
Filed: Jan. 12, 2005

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**ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS**

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Before: BROWNING, PREGERSON, and BERZON, Circuit Judges.

PREGERSON, Circuit Judge.

Nopring Paulino Penuliar petitions for review of a decision of the Board of Immigration Appeals ("BIA"). Penuliar, a lawful permanent resident, pled guilty to two counts of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). Classifying both convictions as "aggravated felonies" under the Immigration and Nationality Act ("INA"), an Immigration Judge ("IJ"), affirmed by the BIA, found Penuliar ineligible for cancellation of removal and voluntary departure, and

ordered that Penuliar be deported pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Because we conclude that Penuliar's convictions do not constitute "aggravated felonies" under the INA, we grant his petition for review.

## FACTUAL AND PROCEDURAL BACKGROUND

Nopring Paulino Penuliar, a citizen of the Philippines, was admitted to the United States on June 12, 1995, as a lawful permanent resident. On June 30, 2000, Penuliar pled guilty to one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and was sentenced to two years' imprisonment. On December 13, 2000, Penuliar pled guilty to another count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). He was sentenced to three years' imprisonment for each charge, to be served concurrently.

While serving his sentence in state prison, the Immigration and Naturalization Service ("INS")[1] served Penuliar with a notice to appear.[2] In the notice

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[1] The INS ceased to exist on March 1, 2003, when its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135. However, we refer to the agency as the INS here because the proceedings in this case were instigated before the transfer.

[2] The initial notice to appear charged that Penuliar was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), because he had been convicted of "an offense relating to obstruction of justice," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(S). The IJ ruled that Penuliar's convictions did not constitute offenses "relating to obstruction of justice," and the government did not appeal that decision to the BIA. Accordingly, that decision is not before us.

to appear, the INS alleged that Penuliar was removable for being convicted of "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). The INS also alleged that Penuliar was removable for being convicted of "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(G).

At Penuliar's removal hearing, the government introduced into evidence a felony complaint charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to that count. The government also introduced a criminal information charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to both counts. Finally, the government introduced a probation report detailing the conduct underlying the charges in the criminal information.

Based on this evidence, the IJ concluded that Penuliar's two convictions for unlawful driving or taking of a vehicle were "theft offense[s]" under 8 U.S.C. § 1101(a)(43)(G), and that Penuliar's conviction for

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The remaining charges, which are before us, were included in an amended notice to appear.

evading an officer was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). Accordingly, the IJ ruled that Penuliar was removable as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and therefore ineligible for cancellation of removal and voluntary departure. *See* 8 U.S.C. §§ 1229b(a)(3), 1229c(a)(1).

On March 31, 2003, the BIA summarily affirmed the decision of the IJ. *See* 8 C.F.R. § 1003.1(e)(4). Penuliar timely filed this petition for review.

## JURISDICTION AND STANDARD OF REVIEW

This court lacks jurisdiction to review a final order of removal against an alien who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C). Nonetheless, "[b]ecause the issue in this appeal is whether [the petitioner] committed an aggravated felony, and because we have jurisdiction to determine our own jurisdiction, the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000) (citation omitted).

We review *de novo* whether a particular offense is an aggravated felony. *Id.*

## DISCUSSION

To determine whether a conviction is an "aggravated felony" under the INA, we employ the two step test set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). *See Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). First, "we look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)." *Id.* "Under this 'categorical approach,' an offense qualifies as an aggravated felony 'if and only if the full range of

conduct covered by the[criminal statute] falls within the meaning of that term.'" *Id.* (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)).

However, when the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, we follow a "modified categorical approach." *See id.; United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). Under this approach, we conduct "a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime." *Chang*, 307 F.3d at 1189. "[W]e do not, however, look to the particular facts underlying the conviction." *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154 (9th Cir. 2003) (quoting *Ye*, 214 F.3d at 1132).

## I. Evading an Officer

### A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(F), the term "aggravated felony" means "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." Title 18 U.S.C. § 16, in turn, defines the term "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

We have construed 18 U.S.C. § 16 as requiring more than mere negligent conduct. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) ("[W]e hold that the presence of the volitional 'use . . . against' requirement in both prongs of 18 U.S.C. § 16 means that a defendant cannot commit a 'crime of violence' if he negligently—rather than intentionally or recklessly—hits someone or something . . . ."). Thus, in *Trinidad-Aquino* we held that because California's driving under the influence statute, California Vehicle Code § 23153, can be violated through mere negligence, a violation of the statute was not a "crime of violence" under 18 U.S.C. § 16. *Id.* at 1146.

The Supreme Court recently affirmed this reading of 18 U.S.C. § 16, holding that a conviction under Florida's drunk driving statute was not a "crime a violence." *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 383-84, 160 L.Ed.2d 271 (2004). The Court reasoned that "[t]he key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 382. Similarly, the Court held that we "must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 383. The Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

California Vehicle Code § 2800.2(a) makes it a crime "[i]f a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pur-

sued vehicle is driven in a willful or wanton disregard for the safety of persons or property." The statute further provides that "willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Cal. Veh.Code § 2800.2(b).

As defined by subsection (b), "willful or wanton disregard" exists if a driver commits three Vehicle Code violations. As one court explained,

> [a]lthough Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof *that the defendant committed three Vehicle Code violations.*

*People v. Pinkston*, 112 Cal. App. 4th 387, 392, 5 Cal. Rptr.3d 274 (2003) (emphasis added). Many California Vehicle Code violations, however, do not require reckless or intentional disregard for the safety of persons or property within the meaning of 18 U.S.C. § 16.[3] In

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[3] For instance, a traffic violation point can be assessed where a driver owns and operates a car that is "(1) [n]ot registered or for which any fee has not been paid under [the vehicle] code," "(2) [n]ot equipped as required in [the vehicle] code," or "(3)[n]ot in compliance with the size, weight, or load provisions of [the vehicle] code." Cal. Veh.Code §§ 12810(f), 40001(b)(1)-(3). In addition, a traffic point may be assessed for, "[e]xcept as provided in subdivision (i) [exempting certain conduct where the driver is not the owner of the vehicle], any other traffic conviction involving the safe operation of a motor vehicle upon the highway." *Id.* § 12810(f).

other words, "willful or wanton disregard," as defined by California Vehicle Code § 2800.2(b), is broader than the traditional *mens rea* of recklessness. *Cf. Trinidad-Aquino*, 259 F.3d at 1146 ("Thus, recklessness requires conscious disregard of a risk of harm that the defendant is aware of—a volitional requirement absent in negligence."). Because it would be possible to engage in "willful or wanton disregard for the safety of persons or property" by negligently committing three Vehicle Code violations, Section 2800.2 is broader than a "crime of violence" as defined by 18 U.S.C. § 16.

The government relies on *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), in which we held that the offense of evading an officer under the 1992 version of California Vehicle Code § 2800.2 was a "crime of violence" under 18 U.S.C. § 16. In reaching this conclusion, we relied on California case law construing "willful or wanton misconduct" as "intentional wrongful conduct." *Id.* at 961. But the meaning of "willful or wanton disregard" in section 2800.2 has since been amended to include the commission of three California Vehicle Code violations. *See Pinkston*, 112 Cal.App.4th at 391, 5 Cal. Rptr. 3d 274 ("Vehicle Code section 2800.2, subdivision (b) . . . was added to section 2800.2 in 1996."). Because *Campos-Fuerte* relied on the previous meaning of "willful or wanton" in reaching its result, it is not binding in the present case.

Accordingly, we conclude that a conviction for evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a "crime of violence" within the meaning of 18 U.S.C. § 16.

B. Modified Categorical Approach

In concluding that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16, and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), the IJ relied on three pieces of evidence.

The IJ relied on (1) the November 21, 2000, criminal information charging Penuliar with evading an officer in violation of California Vehicle Code § 2800.2(a), (2) an abstract of judgment showing that Penuliar pled guilty to that charge, and (3) a probation officer's report.[4] The government did not introduce either Penuliar's plea agreement or a transcript of Penuliar's plea proceeding into the record. Instead, the government argues that the information and abstract of judgment were sufficient for the IJ to determine that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16. We disagree.

The judicially noticeable documents in the record are insufficient to establish whether Penuliar pled guilty to reckless or negligent conduct. The information charging Penuliar with evading an officer contains nothing more than the generic statutory language from California Vehicle Code § 2800.2(a).[5] But as discussed

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[4] On appeal, however, the government abandons any reliance on the probation officer's report to establish that Penuliar was convicted of a "crime of violence" under the modified approach.

[5] Count three in the November 21, 2000, Information states:

> On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did wilfully and unlawfully, while operating

above, the statute is broader than the generic "crime of violence" under 18 U.S.C. § 16 because it criminalizes negligent conduct. Thus, the abstract of judgment, which simply recites that Penuliar pled guilty to the charge, is plainly insufficient to establish that Penuliar pled guilty to reckless conduct constituting a "crime of violence." *See United States v. Contreras-Salas*, 387 F.3d 1095, 1098 (9th Cir. 2004) (holding that defendant was not convicted of a crime of violence where information and judgment of conviction failed to establish whether defendant was convicted of "volitional, reckless, or negligent conduct").

Finally, insofar as the IJ relied on the probation report to establish that Penuliar pled guilty to a "crime of violence," he was in error. *See Corona-Sanchez*, 291 F.3d at 1212 ("[W]e have held that a presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition.").

Accordingly, we conclude that the BIA erred in affirming the IJ's decision that Penuliar's conviction

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a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all of the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and reasonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.

It is further alleged that the defendant(s) drove with a willful and wanton disregard for the safety of persons and property.

under California Vehicle Code § 2800.2(a) was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F).

## II. Unlawful Driving or Taking of a Vehicle

### A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(G), the term "aggravated felony" means "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." This circuit defines a "theft offense" under § 1101(a)(43)(G) to mean "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (quoting *Corona-Sanchez*, 291 F.3d at 1205).

In *Corona-Sanchez*, we held that a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical "theft offense" under 8 U.S.C. § 1101(a)(43)(G). 291 F.3d at 1208. In reaching this conclusion, we relied in part on the broad nature of aiding and abetting liability under California law, noting that such liability "extend[s] even to promotion and instigation." *Id.*; *see also People v. Beeman*, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, *or of encouraging or facilitating* commission of, the offense." (emphasis added)). We reasoned that because a defendant can be convicted of the substantive offense for aiding and abetting a theft, "it would not be apparent from reference to the

statute of conviction alone to discern whether or not the criminal act was embraced within the federal sentencing definition." *Corona-Sanchez*, 291 F.3d at 1208.

We recently applied this same reasoning, holding that a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense under the INA. *Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2004). Relying on our decision in *Corona-Sanchez*, we concluded that "[b]ecause a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.* at 1022.

A conviction under California's vehicle theft statute is broader than the generic definition of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) for the same reason. Under California Vehicle Code § 10851(a), a person is guilty of unlawful driving or taking of a vehicle if he or she

> drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or . . . is a party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing. . . .

Cal. Veh.Code § 10851(a) (emphasis added). As the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability. *See, e.g.*, *People v. Clark*, 251 Cal.App.2d 868, 874, 60 Cal. Rptr. 58 (1967) ("At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must

have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving."). Because the statute criminalizes activity that is neither "a taking of property or an exercise of control over property," we conclude that a conviction under California Vehicle Code § 10851(a) does not categorically qualify as a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G). *See Martinez-Perez*, 393 F.3d at 1022.

B. Modified Categorical Approach

In concluding that Penuliar committed a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), the IJ relied on two separate convictions under California Vehicle Code § 10851(a). The IJ relied on a felony complaint, dated June 1, 2000, charging Penuliar with unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on June 30, 2000. The IJ also relied on a criminal information, dated November 21, 2000, charging Penuliar with another count of unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on December 13, 2000.[6] As was the case with Penuliar's conviction for evading an officer, the government did not submit

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[6] The IJ also relied on a probation officer's report that details the facts underlying Penuliar's December 13, 2000, conviction for unlawful driving or taking of a vehicle. However, as previously discussed, the IJ's reliance was misplaced insofar as he used the probation officer's report to establish that Penuliar pled guilty to conduct described therein. *See Corona-Sanchez*, 291 F.3d at 1212.

Penuliar's actual plea agreement or a transcript of the plea proceeding.

The government argues that because both counts of unlawful driving and taking of a vehicle describe Penuliar as a principal, and because Penuliar pled guilty to both counts, the charging documents and the abstract of judgment are sufficient to establish that Penuliar was convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Indeed, both charging documents recited the statutory language for unlawful driving or taking of a vehicle under California law, charging Penuliar with "unlawfully driv[ing] and tak[ing] a certain vehicle . . . then and there the personal property of [another] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."[7]

However, as we recognized in *Corona-Sanchez*, under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal. 291 F.3d at

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[7] Count One in the June 1, 2000, felony complaint states:

> On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Count Three of the November 21, 2000, criminal information is identical in its language, except that it lists a different car, license number, and owner.

1207-08; see Cal. Penal Code § § 971, 31; *see also People v. Greenberg*, 111 Cal.App.3d 181, 188, 168 Cal. Rptr. 416 (1980) ("In California one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and abetting theory so long as defendant is charged in that pleading as a principal to the substantive offense and thus receives notice of the charge against him."). Thus, even if Penuliar pled guilty to the charges of unlawful driving or taking of a vehicle in the information and felony complaint, this alone is insufficient to unequivocally demonstrate that he actually pled guilty to activity of a principal, e.g., taking and exercising control over a stolen car.

Again, we must conclude that the IJ erred in finding that Penuliar had been convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). The charging documents, coupled with the abstracts of judgment, simply do not prove that Penuliar actually took and exercised control over a stolen car. On the basis of the record, it is equally plausible that Penuliar pled guilty to the charges based on his activity as an accomplice.

## CONCLUSION

In sum, we hold that evading an officer in violation of California Vehicle Code § 2800.2(a), is not categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). We also hold that unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Finally, we conclude that the BIA erred in affirming the IJ's decision that Penuliar pled guilty to a "crime of violence" or a "theft offense" under the INA.

PETITION GRANTED.

**APPENDIX C**

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A44-948-659 – IMPERIAL Date: [MAR 31 2003]

In re: *S-PENULIAR, NOPRING PAULINO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: RUDY CARDENAS, JR./HAROLD FIFIELD

ON BEHALF OF SERVICE: ANTHONY M. CACAVIO

**ORDER:**

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/ [ILLEGIBLE]
FOR THE BOARD

**APPENDIX D**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
El Centro, California

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File No.: A 44 948 659

IN THE MATTER OF
NOPRING PAULINO PENULIAR, RESPONDENT

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October 30, 2002

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**IN REMOVAL PROCEEDINGS**

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ON BEHALF OF RESPONDENT:

Rudy Cardinez, Esquire
1030 Broadway, Suite 108
El Centro, California 92243

ON BEHALF OF SERVICE:

Thomas Haine, Esquire
Assistant District Counsel
El Centro, California

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at anytime after admission you have been convicted of an aggravated felony as defined in

Section 101(a)(43)(S) of the Act, an offense relating to the obstruction of justice, perjury or subordination of perjury or bribery of a witness for which the term of imprisonment ordered is at least one year.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at anytime after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, by the Immigration Act of 1990 in that you were convicted of an aggravated felony as defined in Section 101(a)(43) (F) and (G) of the Illegal Immigration and Immigrant Responsibility Act of 1996 anytime after entry.

APPLICATION: Cancellation of removal on Form 42A under Section 240A(a) of the Immigration and Nationality Act, as amended.

**ORAL DECISION OF THE IMMIGRATION JUDGE**

The Immigration Service issued a Notice to Appear on April 23rd, 2002 setting forth the first ground of deportability listed above as the basis for the respondent's removal from the United States. The Notice to

Appear was served on the respondent by personal service on April 25th, 2002 and filed with the Immigration Court on May 13th, 2002.

The Notice to Appear directed the respondent to appear before an Immigration Judge on May 16th, 2002.

The respondent did appear before the Immigration Court on May 16th, 2002 at Calapetria (phonetic sp.) State Prison, Calapetria, California. That is a State Prison that is a branch of the California Department of Corrections. The Court holds institutional hearings in that facility.

The respondent indicated that he wished to proceed in English. The respondent was placed under oath to tell the truth in the proceeding. The respondent confirmed that he had received a copy of the Notice to Appear and that his true name is as set forth on the Notice to Appear.

He was advised of the purpose of the proceeding and why he was in court. He stated that he understood that. He was advised of the rights to which he is entitled in these proceedings. He stated that he understood that. The respondent was advised of each of the allegations filed against him by the Immigration Service and the aggravated felony ground of deportability and he stated that he understood those.

The respondent confirmed that he had received Form 41 setting forth his appeal rights and that he had received the list of free legal services.

The respondent was asked if he had retained counsel. He stated that his family has hired Attorney Harold Finefield. He requested the matter be postponed to give him an opportunity to have his attorney appear. The matter was so continued.

At a subsequent hearing on July 10th of 2002 the respondent admitted that he is not a citizen or a national of the United States. That he is a native and citizen of the Philippines. That he had been admitted to the United States at Los Angeles, California on or about June 12, 1995 as an immigrant. He entered a denial to allegations seven, eight, nine, ten and eleven as well as twelve, those being three criminal convictions out of the Los Angeles County Superior Court lodged against him by the Immigration and Naturalization Service.

Based upon the respondent's denials, a denial was entered on his behalf to the obstruction of justice, aggravated felony.

The matter was set for a subsequent hearing.

The respondent filed with the Court an application to be considered for cancellation of removal. It is marked as four. The Immigration and Naturalization Service offered into evidence conviction records that were marked and admitted without objection as Exhibit No. 2 and Exhibit No. 3.

The respondent offered a letter from his mother and the mother of his child and those two letters were marked collectively as Exhibit No. 5 and admitted into evidence.

The parties rested on the allegations of removal.

The Court has read and considered the conviction records marked and admitted as Exhibit No. 2 and 3.

The Court is satisfied that the respondent was convicted on June 30th, 2000 in Los Angeles County, California Superior Court for the offense of unlawfully taking a vehicle in violation of Section 10851(a) of the

California Vehicle Code for which he was sentenced to confinement for two years. That particular conviction and the sentence imposed is proved by Exhibit No. 3.

The Court finds that the December 13th 2000 convictions in the Los Angeles County Superior Court, one for the unlawful taking of a vehicle in violation of Section 10851 of the California Vehicle Code for which the respondent was sentenced to a term of confinement of three years and the offense of evading an officer in violation of Section 2800.2(a) of the California Vehicle Code for which he was sentenced to confinement for a period of three years has been proven by Exhibit No. 2.

Based upon the admissions of the respondent and Exhibits No. 2 and 3, the Court will find that the Notice to Appear ground of deportability, that being that after his admission that he has been convicted of an obstruction of justice offense, perjury or subordination of perjury, bribery of a witness, aggravated felony has not been sustained. The Court is not satisfied that evading an officer falls into that category so the Court will find that that ground of deportabiity has not been sustained.

Turning to the lodged charge in Exhibit No. 1-A, the Court finds that after his admission he has been convicted of an aggravated felony under subsection (g) of the Immigration Act, 101(a)(43), a theft offense for which the term of imprisonment is at least one year. That established by the 10851 conviction of June 30th, 2000 for which a two year sentence was imposed and also by the December 13th, 2000 conviction for the same offense for which a term of imprisonment of three years was imposed.

Turning to the lodged charge in Exhibit No. 1-B, the Court is likewise satisfied and makes a finding that the

aggravated felony after admission conviction for evading an officer for which a one year term was imposed is an aggravated felony under Section 101(a)(43)(F), a crime of violence for which the term of imprisonment imposed was at least one year.

Counsel for respondent was queried as to whether there was any viable claim for protection under withholding or Article III of the Convention Against Torture. Counsel related a conversation he had with his client.

Based upon that, the Court queried the respondent as to whether he had any reason to believe that it was more likely than not that his life or freedom would be in danger if he is returned to his native country on account of his race, religion, nationality, membership in a particular social group or his political opinion and he responded "no". The respondent was then asked if he had any reason to believe that it was more likely than not that he would be tortured if returned to his native country by a public official, someone acting on behalf of the government or with the government's acquiescence in his known torture and he responded "no".

The Court would find that the respondent based upon the convictions that he's suffered that are aggravated felonies, that he is statutorily ineligible to be considered for cancellation of removal in either of its forms.

The respondent is statutorily ineligible to be considered for voluntary departure in either of its forms. He is statutorily ineligible to be considered for asylum. He is statutorily ineligible to be considered for registry and there is no issue that 212(c) applies in this case.

Based upon the Court's questioning of the respondent, there is no viable claim to be considered for with-

holding or Article III protection under the Convention Against Torture.

No applications were submitted for other forms of relief and the respondent is not eligible for cancellation. The Court denies his application for cancellation of removal under Section 240A(a) of the Immigration Act, as amended.

Based upon the evidence of record, the Court orders the respondent removed from the United States to the Philippines as charged by the Immigration Service under the following theories: Section 237(a)(2))A)(iii), that he has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) and (G).

No applications for relief having been sustained, the respondent is ordered removed from the United States to the Philippines as charged.

/s/ DENNIS R. JAMES
DENNIS R. JAMES
Immigration Judge

# ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

**[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]**

[ ] SUPERIOR COURT OF CALIFORNIA, COUNTY OF: LOS ANGELES
[ ] MUNICIPAL BRANCH OR JUDICIAL DISTRICT: SOUTHEAST

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: PENULIAR, NOPRING PAULINO<br>DOB: 11-11-79<br>AKA:<br>CII #:<br>BOOKING #: 6639791 [ ] NOT PRESENT | CASE NUMBER<br>NA 045170 |
| COMMITMENT TO STATE PRISON<br>ABSTRACT OF JUDGMENT [ ] AMENDED ABSTRACT | |
| DATE OF HEARING: 12-13-00 / DEPT NO.: SE S / JUDGE: L.S. KNUPP | |
| CLERK: E. CASSIDY / REPORTER: L. PERALTA / PROBATION NO. OR PROBATION OFFICER: X 1762327 | |
| COUNSEL FOR PEOPLE: M. GROSBARD / COUNSEL FOR DEFENDANT: D. BUTKO [ ] APPTD | |

1. Defendant was convicted of the commission of the following felony:

| CNT | CODE | SECTION NUMBER | CRIME | YEAR CRIME COMMITTED | DATE OF CONVICTION (MO/DATE/YEAR) | CONVICTED BY: JURY | COURT | PLEA | TERM (L, M, U.) | TIME IMPOSED: YRS. | MOS. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | VC | 10851(A) | UNLAWFUL TAKE VEH | 00 | 06 30 00 | | | X | M | 2 | 0 |

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| CNT | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes).
5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $___ per PC 1202.4(b) forthwith per PC 2085.5.
   b. RESTITUTION FINE of: $ ___ per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $____ per PC 1202.4(f) to [ ] victim(s)* [ ] Restitution Fund
   (*List victim name(s) if known and amount breakdown in item 7, below.)
   (1) [ ] Amount to be determined. (2) [ ] Interest rate of: _% (not to exceed 10% per PC 1202.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts: _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.7(a). f. [ ] FINE of $ _____ per PC 1202.5
6. TESTING: [ ] AIDS [ ] DNA pursuant to [ ] PC 1202.1 [ ] PC 290.2 [ ] other (specify)
7. Other orders (specify): Ct 3 (Misd) = Defendant sentenced to 60 das C.J. to run concurrently with sentence Ct 1. (May be served in any state institution.)
8.

| | | |
|---|---|---|
| TOTAL TIME IMPOSED: | 2 | 0 |

9. [ ] This sentence is to run concurrent with (*specify*):
10. Execution of sentence imposed
    a. [ ] at initial sentencing hearing.
    b. [ ] at resentencing per decision on appeal
    c. [xx] after revocation of probation.
    d. [ ] at resentencing per recall of commitment (PC 1170(d).)
    e. [ ] other (*specify*):
11.

| DATE SENTENCE PRONOUNCED | CREDIT FOR TIME SPENT IN CUSTODY 176 | TOTAL DAYS. INCLUDING: | ACTUAL LOCAL TIME | LOCAL CONDUCT CREDITS 28 | [ ] 4019 [ ] 2933.1 | SERVED TIME IN STATE INSTITUTION [ ] DMH | [ ] CDD | [ ] CRC |
|---|---|---|---|---|---|---|---|---|
| 12-13-00 | | | | | | | | |

12. The defendant is remanded to the custody of the sheriff [xx] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.
    To be delivered to [xx] the reception center designed by the director of the California Department of Corrections.
    [ ] other (specify):

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CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

| DEPUTY'S SIGNATURE | DATE |
|---|---|
| /s/ Illegible | JAN 19 2001 |

This form is prescribed under PC1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

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**ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE**
**SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM**

possess an instrument and weapon of the kind commonly known as a BILLY CLUB.

* * * * *

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER NA045170, CONSISTS OF 6 COUNT(S).

Executed at LONG BEACH, County of Los Angeles, on June 1, 2000.

/s/ S. NELSON
DECLARANT AND COMPLAINANT

---

GIL GARCETTI, DISTRICT ATTORNEY

/S/ BY: MARC MERRICK
MARC MERRICK, DEPUTY

AGENCY: LONG BEACH PD I/O: S. NELSON

ID NO.: 5195 PHONE: 310-570-7444

DR NO.: 000040799 OPERATOR: WY

PRELIM. TIME EST.: 1 HOUR(S)

OF FINANCIAL RESPONSIBILITY—PRIOR CONVICTION, in violation of VEHICLE CODE SECTION 16028(a), an Infraction, was committed by NOPRING PAULINO PENULIAR, who did, without evidence of financial responsibility, drive upon a highway a motor vehicle required to be registered in this state.

It is further alleged that the defendant was previously convicted of this offense within the past three years.

* * * * *

COUNT 5

On or about May 31, 2000, in the County of Los Angeles, the crime of POSSESSION OF BURGLAR'S TOOLS, in violation of PENAL CODE SECTION 466, a Misdemeanor, was committed by STEVE SIMPILO, who did unlawfully have in his/her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water pump pliers, slidehammer, slim jim, tension bar, lockpick gun, tubular lock pick, floor safe door puller, master key, and other instrument and tool with intent feloniously to break and enter a building, railroad car, aircraft, vessel, trailer coach, and vehicle.

* * * * *

COUNT 6

On or about May 31, 2000, in the County of Los Angeles, the crime of POSSESSION OF A DEADLY WEAPON, in violation of PENAL CODE SECTION 12020(a)(1), a Misdemeanor, was committed by STEVE SIMPILO, who did unlawfully manufacture, cause to be manufactured, import into the State of California, keep for sale, offer and expose for sale, and give, lend, and

* * * * *

COUNT 2

On or about May 31, 2000, in the County of Los Angeles, the crime of RECEIVING STOLEN PROPERTY, MOTOR VEHICLE, in violation of PENAL CODE SECTION 496d(a), a Felony, was committed by STEVE SIMPILO and NOPRING PAULINO PENULIAR, who did unlawfully buy and receive 1994 FORD ESCORT, LICENSE #3GUM326 that was stolen and had been obtained in a manner constituting theft and extortion, knowing the property to be stolen and obtained, and did conceal, sell, withhold, and aid in concealing, selling and withholding said property.

* * * * *

COUNT 3

On or about May 31, 2000, in the County of Los Angeles, the crime of DRIVING WHEN PRIVILEGE SUSPENDED OR REVOKED, in violation of VEHICLE CODE SECTION 14601.1(a), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive a motor vehicle upon a highway at a time when his/her driving privilege was suspended and revoked for a reason other than one listed in Section 14601 and 14601.2 of the Vehicle Code, to wit, FAILURE TO APPEAR, and when he/she had knowledge of such suspension and revocation.

* * * * *

COUNT 4

On or about May 31, 2000, in the County of Los Angeles, the crime of DRIVING WITHOUT EVIDENCE

**APPENDIX F**

MUNICIPAL COURT OF LONG BEACH
JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

---

CASE NO. NA45170

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

*v.*

01 STEVE SIMPILO (6/20/1949), AND
02 NOPRING PAULINO PENULIAR (11/11/1979),
DEFENDANT(S)

---

**FELONY COMPLAINT**

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The undersigned is informed and believes that:

COUNT 1

On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE #3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

# ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

***|NOT VALID WITHOUT PAGE TWO OF CR-290 ATTACHED|***

**|Not to be used for multiple count convictions or for 1/3 consecutive sentences.|**

| | | |
|---|---|---|
| [ ] SUPERIOR COURT OF CALIFORNIA COUNTY OF: LOS ANGELES<br>[ ] MUNICIPAL BRANCH OF JUDICIAL DISTRICT: SOUTHEAST | | |
| PEOPLE OF THE STATE OF CALIFORNIA vs DOB: 11-01-79<br>DEFENDANT: PENULIAR, NOPRING PAULINO<br>AKA<br>XXX<br>BOOKING # 6639791 [ ] NOT PRESENT | | VA 062071 -A<br>-B<br>-C<br> |
| COMMITMENT TO STATE PRISON<br>ABSTRACT OF JUDGMENT | [ ] AMENDED ABSTRACT | -D |

| DATE OF HEARING | DEPT NO. | JUDGE |
|---|---|---|
| 12-13-00 | SE S | L.S. KNUPP |

| CLERK | REPORTER | PROBATION NO. OR PROBATION OFFICER |
|---|---|---|
| E. CASSIDY | L. PERALTA | X 1762327 |

| COUNSEL FOR PEOPLE | COUNSEL FOR DEFENDANT | |
|---|---|---|
| M. GROSBARD | L. MEND | [ ] APPTD. |

1. Defendant was convicted of the commission of the following felonies:

[ ] Additional counts are listed on attachment

_____ (number of pages attached)

| CON-VICTED BY | Term (L, M, U) | Count | Consecutive 1/3 Violent | Consecutive 1/3 Non-violent | Consecutive Full Term | Incomplete Sentence (refer to item 5) | 654 Stay | PRINCIPLE OR CONSECUTIVE TIME IMPOSED |
|---|---|---|---|---|---|---|---|---|

| CNT | CODE | SECTION NO. | CRIME | YEAR CRIME COMMITTED | DATE OF CONVICTION (MO/DATE/ YEAR) | jury | court | plea | | | | | | | YRS. | MOS. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2 | VC | 10851(A) | UNLAWFUL TAKE V. | 00 | 12/13/00 | | | X | U | | | | | | 3 | 0 |
| 3 | VC | 2800.2(A) | EVADE OFFICER | 00 | 12/13/00 | | | X | U | X | | | | | (3 | 0) |
| | | | | | / / | | | | | | | | | | | |
| | | | | | / / | | | | | | | | | | | |
| | | | | | / / | | | | | | | | | | | |

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| CNT | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| ENHANCEMENTS | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes)

5. INCOMPLETE SENTENC(S) CONSECUTIVE

| COUNTY | CASE NUMBER |
|---|---|
| | |
| | |
| | |
| | |

6.

| TOTAL TIME ON ATTACHED PAGES |
|---|
| |

7. [ ] Additional indeterminate term (see CR-292).

8.

| TOTAL TIME | 3 | 0 |
|---|---|---|

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

(Continued on reverse)

**ABSTRACT OF JUDGMENT–PRISON COMMITMENT–DETERMINATE**
**(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)**

| PEOPLE OF THE STATE OF CALIFORNIA VS. DEFENDANT: PENULIAR, NOPRING PAULINO | | | |
|---|---|---|---|
| -A | -B | -C | -D |

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $200.00 per PC 1202.4(b) forthwith per PC 2085.5
   b. RESTITUTION FINE of: $200.00 per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $_____ per PC 1202.4(f) to [X] victim(s)* [ ] Restitution Fund
   (*List victim name(s) if known and amount breakdown in item 11, below.)
   (1) [ ] Amount to be determined.
   (2) [ ] Interest rate of: _____% (not to exceed 10% per PC 1204.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.7(a).
   f. [ ] FINE of $ _____ per PC 1202.5

10. TESTING:
   a. [ ] AIDS pursuant to [ ] PC 1202.1 [ ] other (specify):
   b. [ ] DNA pursuant to [ ] PC 290.2 [ ] other (specify):

11. Other orders (specify):

12. Execution of sentence imposed

   a. [XX] at initial sentencing hearing. d. [ ] at resentencing per recall of commitment. (PC 1170(d).)
   b. [ ] at resentencing per decision on appeal. e. [ ] other (specify):
   c. [ ] after revocation of probation.

13. CREDIT FOR TIME SERVED

| CASE NUMBER | TOTAL CREDITS | ACTUAL | LOCAL CONDUCT |
|---|---|---|---|
| VA 06207 -A | 0 | 0 | 0 [ ] 4019<br>[ ] 2933.1 |
| -B | | | [ ] 4019<br>[ ] 2933.1 |
| -C | | | [ ] 4019<br>[ ] 2933.1 |
| -D | | | [ ] 4019<br>[ ] 2933.1 |
| DATE SENTENCE PRONOUNCED: 12-13-00 | SERVED TIME IN STATE INSTITUTION: [ ] DMH | [ ] CDC | [ ] CRC |
| | | | |

14. The defendant is remanded to the custody of the sheriff [XX] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to [XX] the reception center designated by the director of the California Department of Corrections.
[ ] other (specify):

---

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

| DEPUTY'S SIGNATURE | DATE |
|---|---|
| /s/ Illegible | APR 25 2001 |

**ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE**

**APPENDIX H**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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Case No. VA06207

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

*v.*

01 NOPRING PAULINO PENULIAR (11/11/1979)
(BK# 6639791), AKA ALEXIS DELACRUZ, DEFENDANT(S)

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[Filed: Nov 21, 2000]

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Arraignment Hearing
Date: 11/21/2000
Department: SE S

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**INFORMATION**
**SUMMARY**

| Ct. No. | Charge | Charge Range | Defendant | Special Allegation | Alleg. Effect |
|---|---|---|---|---|---|
| 1 | PC 487(d) | 16-2-3 | PENULIAR, NOPRING | PC 666.5 | 2-3-4 Yrs |
| 2 | VC 10851(a) | 16-2-3 | PENULIAR, NOPRING | PD 666.5 | 2-3-4 Yrs |
| 3 | VC 2800.2(a) | 16-2-3 | PENULIAR, NOPRING | | |
| 4 | VC 20002(a) | 6 Mo. | PENULIAR, NOPRING | | |
| 5 | PC 148(a)(1) | 1 Yr. | PENULIAR, NOPRING | | |

The District Attorney of the County of Los Angeles, by this Information alleges that:

COUNT 1

On or about October 18, 2000, in the County of Los Angeles, the crime of GRAND THEFT AUTO, in violation of PENAL CODE SECTION 487(d), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully take an automobile, 1995 FORD VAN.

* * * * *

COUNT 2

On or about October 18, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1995 FORD VAN, LIC. #3LTC412, then and there the personal property of ARLENE DEOCADES without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

* * * * *

COUNT 3

On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did willfully and unlawfully, while operating a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and rea-

sonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.

It is further alleged that the defendant(s) drove with a willful wanton disregard for the safety of persons and property.

* * * * *

COUNT 4

On or about October 18, 2000, in the County of Los Angeles, the crime of HIT-RUN DRIVING, in violation of VEHICLE CODE SECTION 20002(a), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who was the driver of a vehicle involved in an accident resulting in damage to property, who did unlawfully fail to stop the vehicle at the scene of the accident and comply with subsection(s) (1) of Vehicle Code section 20002(a).

* * * * *

COUNT 5

On or about October 18, 2000, in the County of Los Angeles, the crime of RESIST, OBSTRUCT, DELAY OF PEACE OFFICER OR EMT, in violation of PENAL CODE SECTION 148(a)(1), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who did willfully and unlawfully resist, delay and obstruct DEPUTY POWELL who was then and there a peace officer attempting to and discharging the deputy of his/her office and employment.

It is further alleged pursuant to Penal Code section 666.5 as to count(s) 1 and 2 that the defendant(s), NOPRING PAULINO PENULIAR was previously convicted of a violation of California VEHICLE Code Section 10851 on JUNE 30, 2000 in the Superior Court of LOS ANGELES County.

* * * * *

**APPENDIX I**

U.S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VA

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File No.: A44 948 659

IN THE MATTER OF
NOPRING PAULINO PENULIAR, APPELLANT

---

**IN REMOVAL PROCEEDINGS**

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**APPELLANT'S BRIEF**

**STATEMENT OF ISSUES**

1. Whether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and therefore, ineligible for relief under § 240A(a) of the Immigration and Nationality Act (hereinafter INA)?

2. Whether the Immigration Judge erred in finding Appellant ineligible for any relief under the INA?

**STATEMENT OF PROCEEDINGS**

On or about April 23, 2002 The Immigration and Naturalization Service (hereinafter INS) issued a Notice to Appear (hereinafter NTA) against Appellant charging he was removable under § 237(a)(2)(A)(iii) of the INA as an aggravated felon as defined in § 101(a)(43)(S) of the INA as having been convicted of an obstruction of justice offense and a term of imprisonment for at least one year. The NTA alleged

Appellant to be a native and citizen of the Philippines not a citizen or national of the United States who was admitted to the United States on or about June 21, 1995 as an immigrant. The NTA further alleged a June 30, 2000 conviction for unlawfully taking a vehicle in violation of § 10851(a) of the California Vehicle Code and a sentence of 2 years. The NTA further alleged a December 13, 2000 conviction for unlawfully taking a vehicle in violation of § 10851(a) of the California Vehicle Code and a sentence of 3 years. The NTA further alleged a December 13, 2000 conviction for evading an officer in violation of § 2800.2(a) of the California Vehicle Code and a sentence of 3 years.

On or about May 29, 2002, the matter was set to a bond hearing on June 18, 2002. Following a denial of bond the matter was set to July 10, 2002. On July 10, 2002, the matter was continued to July 17, 2002. On July 11, 2002, the INS issued an additional charge of inadmissibility charging Appellant was an aggravated felon under § 101(a)(43)(F) and (G) of the INA. On July 17, 2002 the INS issued another additional charge of inadmissibility charging Appellant to being an aggravated felon under § 101(a)(43)(G) as having been convicted of a theft offense for, which the term of imprisonment is at least one year. On July 17, 2002 an individual hearing was scheduled for October 30, 2002.

On or about October 30, 2002, an individual hearing was held before the Honorable Dennis R. James, Immigration Judge. The Immigration Judge held, based on the conviction documents, Appellant had been convicted as alleged in the NTA and was an aggravated felon having been convicted of a theft crime and sentenced to over 1 year and as having been convicted of a crime of violence and sentenced to over one year.

The Immigration Judge denied Appellant's application for cancellation of removal and ordered him removed. Appellant reserved appeal. A timely appeal was filed from the decision of the Immigration Judge and this brief is in support of that appeal.

## STATEMENT OF FACTS

Appellant is a 23 year old, single, male, native and citizen of Philippines who entered the United states as alleged in NTA on June 21, 1995 as an immigrant at the age of 15 years old. Appellant's family ties in the United States include his mother who is a naturalized United States citizen and four siblings, three of which are lawful permanent residents and one of whom is a United States citizen. Appellant also has a United States citizen daughter with his domestic partner, who is also a United States citizen. It was determined Appellant had been convicted as alleged in the NTA.

## ARGUMENT I

### THE IMMIGRATION JUDGE ERRED IN FINDING NO RELIEF AVAILABLE TO APPELLANT

Appellant contends because there are individuals, which remain eligible for relief under § 212(c) of the INA in exclusion or deportation setting, the unavailability of relief violates the equal protections clause in the United States Constitution and violates Appellant's due process rights. The Fifth Amendment of the United States Constitution stated:

> No person shall be deprived of life, liberty or property without due process of law.

The Fifth Amendment applies to lawful permanent residents such as Mr. Penuliar as he is a "person"

whose life, liberty and property interest are protected by the United States Constitution as equally as that of a United States citizen. It is true Congress is vested with plenary powers over matters concerning aliens pursuant to Article I of the Constitution. However, the plenary power is not an absolute power. The Supreme Court stated that "it is well established that the Fifth Amendment entitled aliens to due process of law deportation proceedings". *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 1449, 123 L. Ed. 2d 1 (1993).

The recently enacted aggravated felony definition is now said to be retroactive to all acts committed "before, on or after September 30, 1996". Appellant contends the disparate treatment between those individuals who were previously in deportation or exclusion proceedings for similar criminal acts who are now in removal proceedings and denied relief, violates equal protection under the law.

**CONCLUSION**

For the reasons stated above, and others that may be apparent to the Board, Appellant respectfully requests the Board determine he is not removable as an aggravated felon and remand this matter for consideration of relief in the form of cancellation of removal under § 240A(a) of the INA.

Respectfully submitted,

CARDENAS & FIFIELD, A.P.C.

DATE: 2/25/03 /s/ RUDY CARDENAS, JR.
RUDY CARDENAS, JR.
Attorney for Respondent

U.S. Department of Justice
Executive Office for Immigration Review
*Board of Immigration Appeals*

**Notice of Appeal from a Decision of an Immigration Judge**

1.

| Staple Check or Money Order Here. Include Name(s) and "A" number(s) on the face of the check or money order. | List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s):<br>Nopring Paulino PENULIAR<br>A44 948 659 |
|---|---|

2. I am the [X] Respondent/Applicant [ ] INS (*Mark only one box.*)

3. I am [X] DETAINED [ ] NOT DETAINED (*Mark only one box.*)

4. My last hearing was at El Centro, CA (*Location, City State*)

5.

**What decision are you appealing?**

*Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26)*

[x] I am filing an appeal from the Immigration Judge's decision in ***merits*** *proceedings* (example: removal, deportation, exclusion, asylum, et c.) dated October 30, 2002.

[ ] I am filing an appeal from the Immigration Judge's decision in ***bond*** *proceedings* dated _____.

[ ] I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

*(Please attach a copy of the Immigration Judge's decision you are appealing.)*

6.

**State in detail the reason(s) for this appeal. Please refer to the Instruction at part F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

The Immigration Judge erred in ruling the crimes I was convicted of were aggravated felonies. It is believed and alleged removability was not established by clear and convincing evidence. In addition, the Immigration Judge should have allowed me to have an application for relief adjudicated. I am appealing the decision of the Immigration Judge for the following reasons:

1. It is not clear that the crimes set out in the Notice to Appear are aggravated felonies. It is, therefore, not clear that removability had been established by clear and convincing evidence. If the Judge had properly ruled that the crimes in the Notice to Appear were not aggravated felonies, I would have been eligible to apply for cancellation of removal or 212(c) relief.

2. It is believed there is current legislation in Congress to allow persons to apply for cancellation of removal as long as they were not sentenced to more than five years for an aggravated felony. We are appealing the denial of cancellation because in the future legislation will allow a person to apply for cancellation as long as the person was not sentenced to more than five years for an aggravated felony. Consequently, it is believed the crimes committed

SEE ADDENDUM

*( Attached additional sheets if necessary)*

7. Do you desire oral argument before the Board of Immigration Appeals? [ ] Yes [X] No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? [X] Yes [ ]No

[redacted]

9.

SIGN HERE →

x /s/ Nopring Penuliar
Signature of Person Appealing
*(or attorney or representative)*

11/25/02
Date

64a

10.

Mailing Address of Respondent(s)/Applicant(s)

NOPRING Paulino PENULIAR
(Name)

c/o 1115 N. Imperial Avenue
(Street Address)

(Apartment or Room Number)

El Centro, CA 92243
(City, State, Zip Code)

None
(Telephone Number)

11.

Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

Rudy Cardenas, JR.
(Name)

1030 Broadway
(Street Address)

Suite 108
(Suite or Room Number)

El Centro, CA 92243
(City, State, Zip Code)

(760) 353-5710
(Telephone Number)

[redacted]

[redacted]

12.

**PROOF OF SERVICE**
**(You Must Complete This)**

I Nopring Paulino PENULIAR mailed or delivered a copy of this Notice of Appeal

on 11/25/02 to INS Assistant District Counsel

at 1115 N. Imperial Avenue, El Centro, CA 92243
(Address of Opposing Party)

✍ SIGN HERE

X Paulino Penuliar
Signature

[redacted]

[redacted]

[ ] Read all of the General Instructions
[ ] Provided all of the requested information
[ ] Completed this form in English
[ ] Provided a certified English translation for all non-English attachments

**HAVE YOU?**

[ ] Signed the form
[ ] Served a copy of this form and all attachments on the opposing party
[ ] Completed and signed the Proof of Service
[ ] Attached the required fee or Fee Waiver Request

ADDENDUM TO FORM EOIR-26
RE: Nopring PENULIAR, A44 948 659

QUESTION #6

even if they are aggravated felonies, the sentence was not more than five years for each conviction.

3. I believe currently there are still persons who are allowed to apply for 212(c) in exclusion proceedings. The amendment to 212(c) by the Anti-Terrorism and Effective Death Penalty Act violates the protection afforded through the due process clause of the Constitution of the United States and denies me equal protection of the laws. It is believed that *Francis v. INS*, 532, F.3d 286 (2d Cir. 1976) *Matter of Silva*, I & N Dec. 26, (BIA 1976), would allow me to have my application for relief adjudicated before the Immigration Judge. I believe this disparate treatment had already been addressed in *Francis*, *Silva*, and *Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991), and, therefore, the Immigration Judge does have authority to follow the decision even though they contain the question of constitutional law. I believe the Immigration Judge should not declare the new section 212(c) unconstitutional, but rather he should follow the above precedents and rule that 212(c) is available in deportation proceedings as well as in exclusion proceedings.

4. I cannot believe that I am not entitled to relief from deportation. The fact that I have resided in the United States since my first entry on June 12, 1995 should have allowed me to remain in the United States. The fact that I have a U.S. citizen mother, Prudencia

Penuliar and three brothers who are legal permanent residents and a sister who is a U.S. citizen should have allowed me to stay in the United States. All my brothers and sisters are in the United States. I cannot believe the Immigration Judge does not have the ability to allow me to stay in the United States since I have been a long time resident of the United States.

All the reasons above, by themselves are in total sufficient to overrule the decision of the Immigration Judge ordering me removed to Mexico. I believe the decision of the Immigration Judge ordering me removed to Mexico should be reversed and the BIA should remand proceedings to allow adjudication of cancellation of removal under § 240A(a), termination or 212(c) relief since removability has not been established.